IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-6068

EUGENE MINOR,

Petitioner,

-vs-

STATE OF MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

EUGENE MINOR,
Petitioner,

LEE M. NATION,
JAMES W. FLETCHER,
Assistant Public Defenders

Office of the Public Defender
1305 Locust
202 Community Justice Center
Kansas City, Missouri 64106
816-474-5811

Counsel for Petitioner

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TABLE OF CITATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Petitioner, EUGENE MINOR, prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Supreme Court entered in the above-entitled case on October 15, 1977.

OPINION BELOW

The opinion and decision of the Missouri Supreme Court is reported at *556 S.W.2d 35*. A copy of the opinion appears in Appendix A attached hereto.

JURISDICTION

The judgment of the Missouri Supreme Court (Appendix A) was originally entered on September 27, 1977. Thereafter, on September 29, 1977, a timely motion for rehearing was filed. see, Rule 84.17, Missouri Rules of Court. Petitioner's motion for rehearing was overruled by the Missouri Supreme Court on October 11, 1977. By the aforesaid denial of the motion for rehearing, the opinion and decision of September 27, 1977 became the final judgment of the highest court in the State of Missouri.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

I

WHETHER MISSOURI'S STATUTORY AND CONSTITUTIONAL SCHEME FOR THE SELECTION OF PETIT JURORS -- WHICH GRANTS WOMEN AN AUTOMATIC EXEMPTION BASED SOLELY ON SEX -- DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW AS MANDATED AND INTERPRETED BY THIS COURT'S OPINION IN *Taylor v. Louisiana, 412 U.S. (1975).*

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,. . ."

Fourteenth Amendment

> ". . . No State shall make or enforce any law which shall abridge theprivileges or immunities of citizens of the United States' nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

STATEMENT

Petitioner, EUGENE MINOR, was charged by indictment with the crimes of Murder, First Degree and Robbery, First Degree. Jury trial was held in the Jackson County Circuit Court (Hall,J.) in Kansas City. Verdicts of guilt were returned as to each count and Petitioner was sentenced to one hundred and fifty years (150) confinement in the Missouri Division of Corrections.

HOW FEDERAL QUESTIONS ARE PRESENTED

1. Prior to trial, Petitioner filed a motion to quash the petit jury panel on the basis that women were systematically excluded from jury service. A hearing was held: John Fitzgerald, Jackson County Jury Commissioner, testified that potential jurors are randomly selected from the Jackson County voter registration lists; these persons are sent questionnaires to determine their eligibility for jury service. By statute, this questionnaire prominently states:

"TO WOMEN:

> The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.
> I elect not to perform jury service."

See Appendix 11, Exhibit 1. Questionnaires returned showing no exemptic were placed in the jury wheel. Evidence was received that the jury wheel was 29.1% female. Each week, names are randomly selected for jury service; these persons are then sent summons for jury service. The summons reads:

> "Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible."

See Appendix 2, Exhibit 2. The Jury Commissioner also testified that if a woman failed to respond to the summons, she was deemed to have exercised her option not to serve. Evidence was also received concerning the number of women appearing for jury service prior to Petitioner's trial. That evidence is as follows: June, 1975 - 15.9% women; July, 1975 - 15.1% women; August, 1975 - 13% women; September, 1975 - 13.7% women; October, 1975 - 10.9% women; January, 1976 - 12.3% women; February, 1976 - 17.6% women; March, 1976 - 15.5% women. Petitioner's panel of fifty-five (55) had six (6) women (10.9%) and his jury of twelve was all male. Census data was also received showing Jackson County, Missouri to be 54% women.

At the close of Petitioner's presentation, the State produced no evidence and the motion to quash was overruled.

2. Subsequent to his trial, Petitioner filed a timely motion for new trial alleging the instant allegation. A timely appeal was prosecuted to the Missouri Supreme Court which held consolidated arguments on the cases *State of Missouri vs. Billy Duren; State of Missouri vs. Eugene Minor, State of Missouri vs. Emerson E. Harlin,* and *State of Missouri v. Vincent X. Lee* (petitions for writs of certiorari on these cases are being filed concurrently herewith). The opinion affirming Petitioner's conviction became final on October 11, 1977. The question presented herein was raised and argued before the trial court and the Missouri Supreme Court.

REASONS FOR GRANTING THE WRIT

The opinion and decision of the Missouri Supreme Court in the instant case is in direct conflict with past decision of this Court, various federal courts of appeals and several state high courts. Specifically, Petitioner contends the instant opinion is in conflict with *Taylor vs. Louisiana, 419 U.S. 522 (1975)* and thus, cannot stand. *Taylor* held Article VII, Section 41 of the Louisiana Constitution and Article 402 of the Louisiana Code of Criminal Procedure (since repealed) violative of *Taylor's* due process rights guaranteed by the XIV Amendment to the United States Constitution.

The Louisiana law is reproduced here for the convenience of the Court:

Article VII, Louisiana Constitution

§41. Selection of jurors; women jurors; trial by judge; trial by jury.

The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishement may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure

Article 402. Service of women as jurors.

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

The United States Supreme Court in *Taylor* re-examined the question of automatic exclusion of women from the juries previously decided by that Court in *Hoyt v. Florida, 368 U.S. 57, 7 L.Ed.2d 118, 82 S.Ct. 159 (1961)* and they reached a different result. Accordingly, the Court stated:

> "Accepting as we do however, the view that the VI Amendment affords the Defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences are that criminal jury venires are almost totally male."
>
> *(42 L.Ed.2d 690 at 702)* [emphasis added]

The question presented herein then whether Missouri offers an "automatic exemption based solely on sex" and if, "the consequences are that criminal jury venires are almost totally male."

The Missouri Constitution, Article I, Section 22(b) states: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." This Article is implemented by Section 497.130, Missouri Revised Statutes (1974), which section allows women to "elect to serve or not to serve as jury women."

When placed side by side and examined, the Missouri system and the Louisiana system (later changed) both offer an absolute exemption to jury service based strictly upon gender. The difference being only that in Louisiana the woman must affirmatively opt for service while her Missouri sister must affirmatively choose not to serve.

The Appellant's argument is much better stated by the United States Supreme Court's final paragraph in the *Taylor* opinion:

> ". . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

The term "reasonably representative thereof" points out the failing of the panel to which the Petitioner objected. It cannot be said that six (6) women on a panel of fifty-five is "reasonably representative" nor does that panel constitute a "cross-section of the community."

Petitioner concludes that "(t)he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions. . ." *Taylor v. Louisiana, at 538.* Petitioner, however, does not believe that a blanket exemption for women is a reasonable exemption. Indeed, as pointed by Mr. Justice Seiler in his dissenting opinion in *State v. Billy Duren, 556 S.W.2d 11, 24, n.4 (1977):*

> "The federal court (the United States District Court for the Western District of Missouri) provides for excuse on request by a woman charged with care of minor children without adequate domestic help."

Petitioner maintains that this is a reasonable exemption for women and would not serve to deny an accused his constitutional right to a representative jury: in the federal court in Kansas City, 53% of the persons on jury wheel are women and 39.8% of the actual jurors chosen were women. *556 S.W.2d at 24.* This data can be contrasted with the Missouri courts: 29% of the persons on the wheel are women; seldom over 15% of the persons appearing for jury service are women; and often, as in the case-at-bar, juries are all male.

Since *Taylor,* several states have been faced with challenges to exemptions to women. All, except Missouri, have changed the exemption by either statute or court decision, see, e.g. *State v. Gethers, 227 S.E.2d 832 (Ga.App.1976); Robinson v. Kimbrough, 540 F.2d 1264 (5th Cir.1976); New York Judiciary Law 549(7); Conn. Gen.Stat.Rev. §51-218, 219; Ga.Code Ann. §59-112(6); La.Stat.Ann. §13-3055; Okla.Stat.Ann. Title 38 §28; Rhode Island Gen.Laws Ann. §9-9-11; Utah Code Ann.§78-46-10(14).* Missouri remains the only state with an automatic exemption for women. Further, this exemption causes gross underrepresentation of women on jury panels. (See attached exhibits as to the women appearing for jury service). The instant opinion cannot stand as a correct interpretation of this Court's opinion in *Taylor.* Unlike the Missouri Supreme Court, Petitioner does not believe *Taylor* stands for the proposition that any percentages of women on jury panels, higher than those found in *Taylor,* is constitutionally permissible; instead *Taylor* condemns jury mechanisms which deny an accused his right to a jury drawn from a reasonable cross-section of society. The Missouri jury selection system is of such a breed: Petitiner's panel (10% women) cannot be considered as representative of society.

Accordingly, a Writ of Certiorari should issue to review the opinion of the Missouri Supreme Court affirming Petitioner's conviction.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Missouri Supreme Court.

EUGENE MINOR Petitioner

LEE M. NATION
Assistant Public Defender
Office of the Public Defender
1305 Locust
202 Community Justice Center
Kansas City, Missouri 64106
816 474-5811

JAMES W. FLETCHER
Assistant Public Defender
Office of the Public Defender
1305 Locust
202 Community Justice Center
Kansas City, Missouri 64106
816 474-5811

Counsel for Petitioner

A copy of the above and foregoing was mailed, postage prepaid, on this the 16 day of January, 1978 to Attorney General John Ashcroft, Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.

LEE M. NATION

JAMES W. FLETCHER

APPENDIX "A"

RENDLEN, Judge.

Charged by indictment with robbery first degree with a deadly and dangerous weapon and felony-murder: robbery, defendant was convicted on each count and sentenced under the Second Offender Act to consecutive terms of fifty years and life imprisonment, respectively. Defendant appealed to the Missouri Court of Appeals, Kansas City district, and raised questions of constitutional construction falling within the exclusive appellate jurisdiction of the Supreme Court under Mo.Const. Art. V, § 3, as amended in 1976. The cause was transferred here prior to opinion.

Seven assignments of error are presented: (1) Failure to quash the jury panel because Missouri's jury selection process systematically excludes women; (2) Erroneous joinder and refusal to sever the two felony charges; (3) Wrongful refusal to grant mistrial following improper prosecutorial statement; (4) Improper sentencing under the Second Offender Act when the trial court failed to make findings sufficient to invoke its application; (5) Failure to give defendant's requested verdict directing instruction to the effect that defendant had withdrawn from the robbery before the murder and hence was not guilty of felony murder; (6) Failure to give instruction MAI–CR 1.08 before each recess; (7) Failure to give instruction MAI–CR 2.70, admonishing the jury to consider the law and evidence as to each count separately.

Sufficiency of the evidence not being raised, a brief statement will suffice at this point, though additional facts pertinent to individual points will be supplied when necessary. On January 2, 1975, defendant entered Traxler's Pharmacy in Kansas City with an accomplice; brandishing a revolver, he ordered the store owner and a customer to get down and began to rake drugs into a pillow case. During the robbery another accomplice entered, warning that the police had arrived. The robbers ran into the back room where the rear door was located but it was firmly locked. Two officers of the Kansas City Police Department had come to the scene and one covered the back door from outside, the other officer, Mestdagh, entered the store. Mestdagh went through the store to the back room where scuffling was heard followed by the sound of three shots. Almost immediately defendant and another of the robbers emerged from the room and were apprehended near the store as they attempted to flee. Mestdagh's body, riddled by three bullets, was found in the back room.

I

[1] Defendant first contends the trial court erred in failing to quash the panel because Missouri's jury selection process, Mo.Const. Art. I, § 22(b) and § 494.031(2), RSMo Supp. 1975, systematically excludes women from jury service and is therefore unconstitutional, citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). *State v. Duren*, No. 59914, 556 S.W.2d 11 (Mo.banc 1977), decided concurrently with the case at bar, upheld the challenged constitutional section and its implementing statute which permit women the privilege of declining jury service and that decision is dispositive of this defendant's sex based challenge to the facial validity of the cited sections.

[2] The remaining question is whether from the evidence it has been shown that the Jackson County jury selection process resulted in criminal venires not "representative of the community" and "almost totally male", as those constitutional standards were delineated in *Taylor*, requiring reversal in this case. By stipulation the evidence presented in the proceeding to quash the jury panel in *State v. Lee*, 556 S.W.2d 25 (Mo.banc 1977), another case decided concurrently herewith, was introduced in the case at bar. Defendant also introduced the list of jurors summoned during the week of trial (December 8, 1975), however, this exhibit was not filed with this court nor included in the transcript on appeal. The panel of 55 in defendant's case had 6 women (10.9%) and the final 12 were men. The evidence does not differ significantly from *Lee*, hence the contention is denied.

II

[3] It is next contended the court erred permitting joinder of charges in a single indictment and compounded the error by denying severance, forcing defense of both in a single trial. The murder of Mestdagh and the drugstore robbery were simultaneous or sequential parts of a single escapade occurring at the same location, constituting different criminal offenses. The state has not attempted to present unconnected crimes in the same trial and joinder of the charges was permissible under Rule 24.04 as amended in 1971.[1] See *State v. Baker*, 524 S.W.2d 122 (Mo.banc 1975).

In *State v. Duren, supra*, this court considered a constitutional challenge to Rule 24.04, essentially the same as that made by this defendant. That ruling controls here and as in *Duren*, defendant has neither suggested nor has our examination of the record disclosed abuse of discretion in denial of the requested severance. This allegation of error is denied.

III

Defendant complains the trial court erred denying defendant's request for mistrial, prompted by the prosecutor's opening statement that defendant's companion, John Francis, admitted complicity in the robbery. The court overruled the motion but warned the prosecutor, out of the jury's hearing, ". . . don't make any more statements like that." The objectionable statement was as follows: "The evidence will further be that at police headquarters that night, detectives in the Crimes Against Persons Unit interviewed John Francis and they identified this defendant, Eugene Minor; that they were told several stories, but ultimately after this defendant was permitted to talk to John Francis in private, both John Francis and this defendant, Eugene Minor, admitted their complicity in this robbery. Each of them denied being the one to shoot Russell Mestdagh, but each admitted their participation in this robbery."

[4] It first should be noted the state may not show that a non-testifying co-indictee has been convicted or pled guilty to the same crime as that which the defendant stands charged, *State v. Fenton*, 499 S.W.2d 813 (Mo.App.1973), nor may the state introduce evidence implicating only the co-indictee, *State v. Mullen*, 528 S.W.2d 517 (Mo. App.1975). See also *State v. Castino*, 264 S.W.2d 372 (Mo.1954). Further, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) condemned the prosecutor's introduction of an accomplice's confession by a third party implicating the defendant because defendant was denied the opportunity of cross-examining the accomplice and confrontation of his accusers.

[5, 6] Here, no attempt was made to introduce evidence of Francis' confession, instead the prosecutor's statement referred only to admission of complicity in the robbery and the fact that Francis denied having shot Officer Mestdagh. The prosecutor claimed the investigating detectives and Francis "identified this defendant, Eugene Minor; that they were told several stories but ultimately after this defendant was permitted to talk to John Francis in private, both John Francis and this defendant, Eugene Minor, admitted *their* complicity in the robbery." (Emphasis ours.) Use of the third person plural possessive 'their' indicates that Francis and Minor both admitted the others' as well as his own complicity. However, in the next sentence the prosecutor stated, "*each* of them denied being the one to shoot Russell Mestdagh, but *each* admitted *their* participation in this robbery."[2] (Emphasis ours.) From this ambi-

1. Rule 24.04, effective July 1, 1971, provides in part: "All offenses which are based on the same act or on two or more acts which are part of the same transaction or on two or more acts or transactions which constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts, or in the same count when authorized by statute."

2. In such cases when "their" is used colloquially with the singular antecedent "each", the use of the pronoun "their" is intended as the third person singular possessive "his". See Webster's New World Dictionary, Second College Edition 1974, p. 1474.

guity it can reasonably be argued the prosecutor, by the colloquial usage, intended to state that each admitted *his* participation but not that of the other. Regardless of the interpretation of the prosecutor's remarks, i. e., whether Francis implicated only himself or Minor as well, the statement was objectionable. Nevertheless we do not believe it was prejudicial, requiring mistrial. The remedy of mistrial is a drastic one, *State v. Johnson*, 504 S.W.2d 23 (Mo.1973) and is to be exercised only in those circumstances where the alleged prejudice can be removed in no other way. *State v. Goff*, 490 S.W.2d 88 (Mo.1973); *State v. Pruitt*, 479 S.W.2d 785 (Mo.1972); *State v. Blockton*, 526 S.W.2d 915 (Mo.App. 1975). As stated in *State v. Camper*, 391 S.W.2d 926, 928 (Mo.1965):

> "`. . . the declaration of a mistrial necessarily and properly rests largely in the discretion of the trial court who has observed the incident giving rise to the request for a mistrial, and who is in a better position than an appellate court to evaluate the prejudicial effect and possibility of its removal by action short of a mistrial."

[7] Though defendant's motion for mistrial was overruled, his objection to the statement was in effect sustained by the trial court's warning to the prosecuting attorney against further "statements like that". The defense made no request that the court instruct the jury to disregard the prosecutor's statement or for similar remedial action. Moreover defendant's guilt was established by abundant evidence. There is no question of identity, indeed defendant did not deny his presence at the scene but claimed only that he did not participate in the robbery; that he was merely a disinterested bystander. He explained his running from the drugstore as an effort to escape being hit by stray gunfire. Two witnesses (the owner and a customer) with ample opportunity for observation inside the drugstore, positively identified defendant at a lineup and in court as one of the non-masked robbers. Each saw defendant with a gun and the owner, who was ordered to open the cash register, saw defendant stuff a pillowcase with drugs and while in the front room, fire his pistol. Both witnesses saw defendant and one companion flee to the rear of the store when the police arrived and shortly after Officer Mestdagh pursued the robbers into the back room, they heard scuffling followed by gunfire. Immediately after the gunshots, one witness saw defendant leave the back room and another (who had taken cover) heard footsteps of someone leaving the store. Officer Gaugh, seeing defendant as he emerged from the store with a handgun, gave chase and was able to catch and arrest him. Five other witnesses identified defendant as the man running from the store and chased by Officer Gaugh.

After defendant was taken to police headquarters and informed of his *Miranda* rights, he admitted participation in the crime in the presence of two detectives and two employees of the prosecuting attorney's office, but later refused to sign a typewritten statement containing his confession.

Our function is to determine, whether as a matter of law, the trial court abused its discretion to the prejudice of defendant in refusing to grant a mistrial. The prosecutor's somewhat ambiguous comment was not followed by further objectionable reference in opening statement, during testimony or in closing argument. The trial judge observed the incident and has the better position to assess its effect and determine measures necessary to cure it. In this case where the evidence of guilt is strong we cannot find prejudice spawned by the prosecutor's improper opening remarks warranting reversal. See *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *State v. DeGraffenreid*, 477 S.W.2d 57, 65 [15] (Mo.banc 1972). The point is denied.

IV

[8] Tried under the Second Offender Act (§ 556.280, RSMo 1969), defendant contends the trial court's findings were inadequate to invoke the court's sentencing authority. The court found appellant had a

previous felony conviction for which he served time in the custody of the Missouri Division of Corrections and that § 556.280, RSMo 1969, was applicable. In *State v. Blackwell*, 459 S.W.2d 268 (Mo.banc 1970) such findings were approved as sufficient under the Act. See also *State v. Bolden*, 525 S.W.2d 625 (Mo.App.1975); *State v. Abernathy*, 515 S.W.2d 812 (Mo.App.1974); *State v. Shumate*, 516 S.W.2d 297 (Mo.App. 1974). The point is without merit.

V

The trial court refused a proffered instruction concerning defendant's alleged withdrawal from the robbery before the murder of Officer Mestdagh. The proposed instruction was as follows:

> "If you find and believe from the evidence that on January 2, 1975, Eugene Minor withdrew from his participation in the robbery of Traxler's Drugstore and that after his withdrawal from the robbery of Traxler's Drugstore Officer Mestdagh was killed by another party acting without the aid or encouragement of Mr. Minor, you must find Mr. Minor not guilty of felony murder."

The only evidence (buttressed by all favorable inferences) supporting defendant's contentions may be summarized as follows: When defendant saw Officer Mestdagh coming into the store, he ran into the back room to escape, but was unable to do so. The officer entered the back room to and drew his revolver from its holster. Defendant then crawled from the back room to the front door and ran outside. Witnesses then heard several shots fired in the rear room of the store where Mestdagh's body was found.

A remarkably similar fact situation is found in *State v. Johnson*, 524 S.W.2d 97 (Mo.banc 1975), reversed on other grounds. There two robbers entered a store, the co-indictee bound the owner in a back room, while defendant rifled the cash register and looted the store. When finished, defendant said, "Come on, let's go, I have got the stuff," and the owner heard him leave. The co-indictee remained to take the contents of the safe, but was interrupted by two police officers, one of whom he killed in the ensuing shootout. This court approved a felony-murder instruction given in the defendant's trial, noting that "the killing occurred 'in flight from the scene of the crime to prevent detection or promote escape' ".

[9-11] It has uniformly been held in Missouri, as in *Johnson*, that escape from a robbery or robbery attempt is part of the crime, *State v. Glenn*, 429 S.W.2d 225 (Mo. banc 1968); *State v. Engberg*, 376 S.W.2d 150 (Mo.1964); *State v. Jasper*, 486 S.W.2d 268 (Mo.banc 1972); *State v. Adams*, 98 S.W.2d 632 (Mo.1936), and "If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other (or others) commits that particular crime, but *he is also guilty of any other crime committed by the other* in pursuance of the common purpose, or as a *natural or probable consequence thereof.*" *State v. Chernick*, 278 S.W.2d 741, 746 [2] (Mo.1955) (Emphasis added). See also *State v. Paxton*, 453 S.W.2d 923 (Mo.1970), *State v. Williams*, 548 S.W.2d 227 (Mo.App.1977); *State v. Sneed*, 549 S.W.2d 105 (Mo.App. 1977). The murder resulting from the attempted escape was a natural and probable consequence of the original crime especially when firearms were employed in the underlying felony. It matters not whether defendant or his accomplice shot the police officer, under the interpretation of the evidence most favorable to defendant, the proffered instruction was properly refused.

VI

[12, 13] Defendant complains the court erroneously failed to give MAI-CR 1.08 before each trial recess as required by Rule 20.02(a).[3] Rule 20.02(e) provides that fail-

3. The first three sentences of Rule 20.02(a), with numbers and emphasis added, require:

> [1] "*Prior to voir dire examination* of the jury the court must read to the jury MAI-CR 1.02."

ure to give a required instruction "shall constitute error, its prejudicial effect to be judicially determined." Since the rule's adoption it has been held that giving instructions containing the substance though not the form of MAI–CR 1.08 is non-prejudicial, absent a showing of jury misconduct. *State v. Gaye*, 532 S.W.2d 783 (Mo.App. 1975); *State v. Abbott*, 547 S.W.2d 853 (Mo. App.1977). See also *State v. Brown*, 502 S.W.2d 295 (Mo.1973), and *State v. Vernor*, 522 S.W.2d 312 (Mo.App.1975).

In *Abbott, supra*, the trial court failed in one instance to give MAI–CR 1.08(b) before a trial recess. In response to an allegation of error it was held no prejudice occurred because: (1) the jury had, prior to the omission, been admonished as required by MAI–CR 1.08(a) & (b) , (2) the jury was instructed at all subsequent recesses and (3) counsel for defendant did not object to the omission or seek remedial action. The court of appeals noted the deference due the trial court's action in overruling defendant's motion for new trial because of its vantage point for observing the jury's conduct. Here the effect of the court's failure to give the instruction at the noon recess before the petit jury was sworn was ameliorated by the following: (1) the panel had a short time earlier received the court's admonition of somewhat similar character through MAI–CR 1.02,[4] (2) at the first recess following the noon recess the court gave a slightly modified form of MAI–CR 1.08(a), (3) at the first recess after the jury was sworn the court gave MAI–CR 1.108(a) verbatim, (4) at the seven subsequent recesses the court instructed the jury on substantially the same subject matter as MAI–CR 1.08(b) and in some instances went beyond the requirements of 1.08(b). There was substantial compliance with the Rule and defendant failed to object to the omission or variance in the instructions given from MAI–CR 1.08. The state has shown by the record no prejudice occurred and we find the error harmless.

VII

[14] Finally defendant claims the court's failure to give instruction MAI–CR 2.70 in this two count indictment case constituted reversible error. The notes on use to MAI–CR 2.70 declare that when multiple counts are submitted, the instruction's purpose is to apprise the jury that evidence as to each count is to be considered separately. See *State v. Johnson*, 537 S.W.2d 816 (Mo. App.1976). The robbery and the murder were parts of the same transaction and the testimony concerning each offense related to the other. All evidence concerning the robbery was essential to the felony-murder charge and most relating to the murder was relevant to the robbery, as the murder occurred during the attempted escape phase. It is difficult to see how the jury could have been misled by considering testimony as to either crime. To assist the jury separate verdict directors were submitted for the robbery and for the murder, each carrying the proviso directing acquittal if the jury did not believe every submitted element.

[2] "*after the jury has been sworn* but before the opening statements, the court must read to the jury MAI–CR Nos. 1.06, 2.01 and 2.02."

[3] "*before each recess or adjournment* of the court the court must read to the jury *MAI–CR 1.08*."

The chronology of items as set forth in the cited portion of the Rule would suggest that MAI–CR 1.08 need not be given except at recesses declared after the jury is sworn and after opening statements. Such an interpretation would cure the omission here. However, we interpret the Rule to require giving 1.08 before each recess or adjournment of the court after the jury panel is sworn for voir dire examination.

4. At the commencement of voir dire, the court read MAI–CR 1.02 advising the array that the 12 selected for jury duty "will be instructed later that you are not to discuss this case with anyone or among yourselves until the case is concluded and you are sent to the jury room with written instructions of the law and to deliberate upon your verdict." The instruction contained the further admonition that attorneys for the state and the defendant, as officers of the court, will avoid saying anything to the jury other than formal salutations and "the same applies to witnesses and to the defendant. They have been or will be instructed to avoid all contacts with the jury even to talk about matters wholly unrelated to the case."

The issues were further pinpointed by four appropriate verdict forms referencing the counts and crimes. These factors weigh heavily against a finding of prejudice stemming from the omission of MAI–CR 2.70. *State v. Johnson, supra; State v. Nelson,* 532 S.W.2d 855 (Mo.App.1975). In addition, an incident occurred demonstrating that the jury considered the law and evidence as to each count separately. During its deliberations the jury sent a note to the court asking "If a person participates in an armed robbery and a murder results in an escape attempt—is that person guilty of murder even though there is no evidence he did do the shooting? The instructions are not clear on this point. Roy L. Dickerson, Foreman."[5] Manifest in this inquiry is the jury's sharp attention to the separate elements of each crime and an awareness that evidence concerning the shooting, which followed the central acts of the robbery, was not accompanied by direct evidence of who fired the shots. It is apparent the jurors understood the evidence and rationally considered each crime, but had questions concerning the law of felony-murder which they later resolved by their separate verdicts. See *State v. Boyington,* 544 S.W.2d 300 (Mo.App.1976). The purpose of MAI–CR 2.70 to assure that the jury, in reaching its verdict, applies the law and evidence to each charge independently, was fulfilled. The state has shown by the record and reasonable inferences therefrom that no prejudice occurred and we find the error harmless. However, this result in this case does not indicate necessarily the same result in other cases wherein MAI–CR 2.70 is not given. The directions in MAI–CR provide that it is to be given in all cases wherein there are multiple counts and trial judges are admonished to follow that direction.

The judgment of the trial court is affirmed.

MORGAN, C. J., and HENLEY and FINCH, JJ., concur.

DONNELLY, J., concurs in result.

BARDGETT, J., dissents for reasons stated in the dissenting portion of his opinion concurring in part and dissenting in part in *State v. Duren,* No. 59914, 556 S.W.2d 11.

SEILER, J., dissents for reasons stated in his dissenting opinion in *State v. Duren,* No. 59914, 556 S.W.2d 11.

5. The court replied in writing: "To the jury: Read all the written instructions. Judge Hall."

APPENDIX "B"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Summons for Jury Service

To FRANK A MARTINEZ
1822 BROADWAY
140 KANSAS CITY, MISSOURI 64108

FRANK A MARTINEZ
1822 BROADWAY
KANSAS CITY, MISSOURI 64108

YOU ARE HEREBY SUMMONED to appear before the Honorable TIMOTHY D. O'LEARY, Judge of DIVISION 15 of the Circuit Court of Jackson County, Missouri IN KANSAS CITY AT 12TH & OAK IN RM 301, ON MONDAY THE 21 day of APRIL, 1975 AT 9 15 o'clock AM to serve as a juror until discharged.

DEFT EX 2

140 APRIL 21

IF YOU FAIL TO APPEAR YOU MAY BE HELD IN CONTEMPT OF COURT.
BRING THIS SUMMONS WITH YOU.
PLEASE READ THE INSTRUCTIONS ON REVERSE SIDE. (OVER)

111 9 1975
P. A. GOTNER Jury Commissioner

PLEASE BRING THIS ENTIRE CARD WITH YOU WHEN YOU APPEAR AT THE JURY ASSEMBLY ROOM.

INSTRUCTIONS

Please note the Judge and location on the front side of this card. You must report to him on the day and at the time specified.

No male juror shall be excused from service except for sufficiently valid reasons to be APPROVED BY THE JUDGE or upon PERSONAL APPEARANCE BEFORE SAID JUDGE AS SHOWN ON THE FRONT OF THIS CARD. Applications for excuses must be presented to said Judge on or before 12 o'clock noon on the Thursday preceeding the date which you are to appear as shown on the reverse side.

A physically disabled juror must show that to appear and serve would endanger his health. Such proof must be in the form of a doctor's certificate and be presented to the Judge the same as other applications.

Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.

Men, if you are over 65 years of age and do not wish to serve, return this summons to the Judge named on the reverse side the same as other applications, before 12 noon Thursday preceeding your date of service. Give your date of birth in your request.

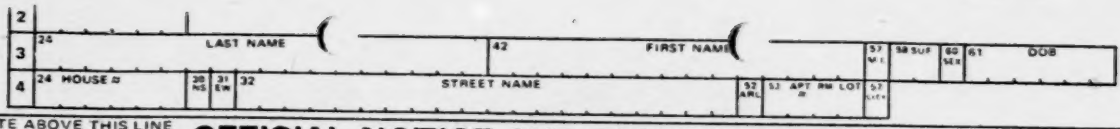
Non-Residents, if you are no longer a resident of Jackson County, Missouri, you are not eligible for jury service. Please let us know you have moved by returning this summons promptly giving your present address.

All persons duly summoned by mail as jurors may be attached for non-appearance and fined by the court for contempt.

We regret that we are unable to furnish parking for jurors.

Please bring this Summons with you when you appear at the Jury Assembly Room.

CIRCT-2800-2/75



DO NOT WRITE ABOVE THIS LINE
FOR INTERNAL USE ONLY

OFFICIAL NOTICE AND QUESTIONNAIRE

(Not a Summons)

L

Enter change of home address here: .....
(Number and Street or Rural Route) (City or Town) (Zip Code)

You have been selected under the provisions of the Missouri statutes for jury service. This questionnaire should be returned immediately.

The laws of the State of Missouri provide that if you do not answer and return this questionnaire, you are subject to citation for contempt.

The law further provides that if you knowingly and falsely answer any of the questions herein contained, you may be guilty of a misdemeanor.

The law requires your name to be placed in the jury wheel if answer is not received promptly.

BY ORDER OF THE BOARD OF JURY SUPERVISORS, UNDER AND BY AUTHORITY OF LAW.

ANN CLARDY,
Jury Commissioner

(1) Please state your sex. Male (.....) Female (.....).

(If you are a female and do not wish to serve, see bottom of questionnaire).

(2) Name of husband or wife. .....

(3) Are you over sixty-five years of age? Yes (.....) No (.....).

Date of Birth. Month.....; Day.....; Year.....

(4) Are you a member of the fire company or police department? Yes (.....) No (.....). (If your answer is "yes", state which.) .....

(5) Are you actually exercising the functions of clergyman or any professor or other teacher of any school of learning? Yes (.....) No (.....). (If your answer is "yes", state where you are so engaged.) .....

(6) Are you a registered and licensed osteopathic physician, veterinarian or chiropractor? Yes (.....) No (.....). (If your answer is "yes", state which.) .....

(7) If you are a female, or if your answer to any of the above questions 3, 4, 5 and 6, is "yes", then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes (.....) No (.....).

(8) Are you actually engaged in the practice of law, medicine or dentistry? Yes (.....) No (.....). (If so, please state which profession.) .....

(9) Are you a member on active duty with any branch of the Armed Forces of the United States? Yes (.....) No (.....).

(10) Is the address shown on the questionnaire correct? Yes (.....) No (.....). (If your answer is "no", state present address.) .....

(11) Are you physically able to serve? Yes (.....) No (.....). (If not, attach physician's or authorized Christian Science practitioner's statement or you will be called.)

(12) Have you served within the last year? Yes (.....) No (.....). (This will be checked if your answer is "yes".)

_____
Signature

TO MEN OVER 65 YEARS OF AGE:

If you are over sixty-five and elect not to serve, fill out this paragraph and mail questionnaire at once to jury commissioner. It will not be necessary to answer the other questions.

Give date of birth _____ (Day) 2 (Month) _____ (Year)

I elect not to do jury service. DEFT.

_____
Signature

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service. 2-10-75 P. A. GOTTEN

_____
Signature

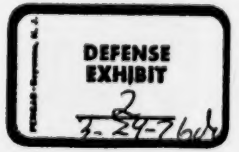
RETURN THIS QUESTIONNAIRE WITHIN 10 DAYS.

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR SERVICE IN KANSAS CITY - JANUARY, 1976

WEEK		JURORS SUMMONED		EXCUSED OR DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
1/5/76	Male	247	(75.5%)	70	19	6	152	(92.7%)
	Female	80	(24.5%)	49	2	17	12	(7.3%)
	Total	327		119	21	23	164	
1/12/76	Male	260	(76.5%)	64	25	24	147	(88.6%)
	Female	80	(23.5%)	48	1	12	19	(11.4%)
	Total	340		112	26	36	166	
1/19/76	Male	245	(76.3%)	71	18	14	142	(87.1%)
	Female	76	(23.7%)	45	0	10	21	(12.9%)
		321		116	18	24	163	
1/26/76	Male	234	(72.0%)	85	12	15	122	(81.9%)
	Female	91	(28.0%)	44	2	18	27	(18.1%)
	Total	325		129	14	33	149	
TOTALS FOR JANUARY 1976	Male	986	(75.1%)	290	74	59	563	(87.7%)
	Female	327	(24.9%)	186	5	57	79	(12.3%)
	Total	1,313		476	79	116	642	

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR SERVICE IN KANSAS CITY - FEBRUARY, 1976

WEEK OF		JURORS SUMMONED		EXCUSED DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
2/2/76	Male	224	(70.9%)	64	26	16	118	(79.7%)
	Female	92	(29.1%)	46	4	12	30	(20.3%)
		316		110	30	28	148	
2/9/76	Male	243	(73.6%)	66	18	23	136	(82.9%)
	Female	87	(26.4%)	48	1	10	28	(17.1%)
	Total	330		114	19	33	164	
2/17/76	Male	120	(67.1%)	35	13	4	68	(81.0%)
	Female	59	(32.9%)	37	1	5	16	(19.0%)
	Total	179		72	14	9	84	
2/23/76	Male	235	(69.9%)	59	19	7	150	(84.7%)
	Female	101	(30.1%)	53	2	19	27	(15.3%)
	Total	336		112	21	26	177	
TOTALS FOR FEBRUARY 1976	Male	822	(70.8%)	224	76	50	472	(82.4%)
	Female	339	(29.2%)	184	8	46	101	(17.6%)
	Total	1,161		408	84	96	573	



DEFENSE EXHIBIT 4

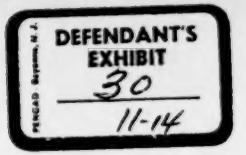
TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976.

Week Beginning:		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared For Service	(%)
March 1, 1976.	Female	90	(72.0%)	56	2	13	19	(13.1%)
	Male	231	(28.0%)	64	21	20	126	(86.9%)
	Total	321		120	23	33	145	
March 8, 1976.	Female	107	(31.9%)	64	2	9	32	(21.8%)
	Male	228	(68.1%)	67	37	9	115	(78.2%)
	Total	335		131	39	18	147	
March 15, 1976.	Female	107	(31.2%)	62	3	17	25	(15.2%)
	Male	228	(68.8%)	58	23	15	140	(84.8%)
	Total	343		120	26	32	165	
March 22, 1976.	Female	50	(26.0%)	27	1	8	14	(15.6%)
	Male	142	(74.0%)	40	17	9	76	(84.8%)
	Total	192		67	18	17	90	
March 29, 1976.	Female	99	(28.6%)	65	3	11	20	(12.5%)
	Male	247	(71.4%)	70	27	10	140	(87.5%)
	Total	346		135	30	21	160	
Total for Weeks of March, 1976.	Female	453	(29.5%)	274	11	58	110	15.5 (~~17.0~~)
	Male	1,084	(70.5%)	299	125	63	597	(83.0%)
	TOTAL	1,537		573	136	121	707	

DEFENDANT'S EXHIBIT 31 11-14

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR OCTOBER, 1975.

Week Beginning		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service	(%)
Oct. 6, 1975.	Female	92	(22.4%)	52	0	19	21	(11.5%)
	Male	319	(77.6%)	97	40	23	161	(88.5%)
	Total	411		149	40	42	182	
Oct. 13, 1975.	Female	88	(21.6%)	52	0	19	17	(8.6%)
	Male	320	(78.4%)	95	28	16	181	(91.4%)
	Total	408		147	28	35	198	
Oct. 20, 1975.	Female	91	(23.3%)	58	1	11	21	(12.1%)
	Male	300	(76.7%)	96	26	25	153	(87.9%)
	Total	391		154	27	36	174	
Oct. 27, 1975.	Female	59	(25.8%)	35	1	10	13	(12.5%)
	Male	170	(74.2%)	52	14	13	91	(87.5%)
	Total	229		87	15	23	104	
Total for Weeks in October, 1975.	Female	330	(22.9%)	197	2	59	72	(10.9%)
	Male	1109	(77.1%)	340	108	77	586	(89.1%)
	Total	1439		537	110	136	658	



TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR SEPTEMBER, 1975.

Week Beginning		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service	(%)
Sept. 1, 1975.	Female	64	(28.2%)	40	4	10	10	(10.3%)
	Male	163	(71.8%)	43	15	18	87	(89.7%)
	Total	227		83	19	28	97	
Sept. 8, 1975.	Female	113	(29.1%)	60	1	22	30	(17.5%)
	Male	275	(70.9%)	81	30	23	141	(82.5%)
	Total	388		141	31	45	171	
Sept. 15, 1975.	Female	78	(27.5%)	43	0	12	23	(16.0%)
	Male	206	(72.5%)	54	15	16	121	(84.0%)
	Total	284		97	15	28	144	
Sept. 22, 1975.	Female	108	(27.7%)	65	2	20	21	(11.2%)
	Male	282	(72.5%)	71	27	17	167	(88.8%)
	Total	390		136	29	37	188	
Sept. 29, 1975.	Female	93	(24.0%)	49	5	14	25	(12.8%)
	Male	294	(76.0%)	72	32	20	170	(87.2%)
	Total	387		121	37	34	195	
Total for Weeks in September, 1975.	Female	456	(27.2%)	257	12	78	109	(13.7%)
	Male	1220	(72.8%)	321	119	94	686	(86.3%)
	Total	1676		578	131	172	795	

DEFENDANT'S EXHIBIT 29 11-14

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR AUGUST, 1975.

Week Beginning		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service	(%)
Aug. 4, 1975.	Female	42	(24.3%)	25	0	7	10	(12%)
	Male	131	(75.7%)	30	15	13	73	(88%)
	Total	173		55	15	20	83	
Aug. 11, 1975	Female	56	(24%)	30	1	12	13	(12.6%
	Male	177	(76%)	43	14	30	90	(87.4%
	Total	233		73	15	42	103	
Aug. 18, 1975.	Female	45	(20%)	28	1	7	9	(9.9%
	Male	181	(80%)	47	33	19	82	(90.1%
	Total	226		75	34	26	91	
Aug. 25, 1975.	Female	59	(25.7%)	23	0	15	21	(17.6%
	Male	170	(74.3%)	44	12	16	98	(82.4%
	Total	229		67	12	31	119	
Total for Weeks in August, 1975.	Female	202	(23.5%)	106	2	41	53	(13%)
	Male	659	(76.5%)	164	74	78	343	(87%)
	Total	861		270	76	119	396	

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR JULY, 1975.

Week Beginning		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service	(%)
July 7, 1975. (Exhibit # 7)	Female	75	(24.8%)	51	2	12	10	(8.7%)
	Male	227	(75.2%)	71	31	20	105	(91.3%)
	Total	302		122	33	32	115	
July 14, 1975. (Exhibit # 8)	Female	108	(28.3%)	48	5	18	37	(22.1%)
	Male	273	(71.7%)	88	44	11	130	(77.9%)
	Total	381		136	49	29	167	
July 21, 1975. (Exhibit # 9)	Female	101	(26.9%)	69	2	9	21	(14.7%)
	Male	275	(73.1%)	78	50	25	122	(85.3%)
	Total	376		147	52	34	143	
July 28, 1975. (Exhibit # 10)	Female	116	(30.0%)	60	3	27	26	(15.8%)
	Male	271	(70.0%)	78	31	23	139	(84.2%)
	Total	387		138	34	50	165	
Total for Weeks in July, 1975.	Female	400	(27.5%)	228	12	66	94	(15.1%)
	Male	1046	(72.5%)	315	156	79	496	(34.9%)
	Total	1446		543	168	145	590	

Exh. 2 MFNT

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR JUNE, 1975.

Week Beginning		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service	(%)
June 2, 1975. (Exhibit # 2)	Female	113	(30.8%)	67	5	12	29	(19.0%)
	Male	255	(69.2%)	79	35	17	124	(81.0%)
	Total	368		146	40	29	153	
June 9, 1975. (Exhibit # 3)	Female	99	(26.6%)	54	5	14	26	(16.6%)
	Male	273	(63.4%)	83	31	26	133	(83.4%)
	Total	372		137	36	40	159	
June 16, 1975. (Exhibit # 4)	Female	65	(24.1%)	39	3	10	13	(11.4%)
	Male	205	(85.9%)	59	27	18	101	(88.6%)
	Total	270		98	30	28	114	
June 23, 1975. (Exhibit # 5)	Female	116	(30.5%)	55	6	26	29	(18.1%)
	Male	264	(69.5%)	71	26	36	131	(81.9%)
	Total	380		126	32	62	160	
June 30, 1975. (Exhibit # 6)	Female	92	(24.6%)	45	3	18	26	(15.1%)
	Male	282	(75.4%)	87	38	11	146	(84.9%)
	Total	374		132	41	29	172	
Total for Weeks in June, 1975.	Female	485	(27.5%)	260	22	80	123	(15.9%)
	Male	1279	(72.5%)	379	157	108	635	(84.1%)
	Total	1764		639	179	188	758	

Exhibit 1 MFNT